of Washington (Dept. 1) was entered June 17, 1965. Petitioner filed timely petition for rehearing (Rules of Supreme Court of Washington, Rule on Appeal 50) which was denied by order dated September 14, 1965 (Apppendix B, infra, page 11a). The jurisdiction of this court is invoked under the provision of 28 U.S.C.A. Sec. 1257(3), 62 Stat. 929.

QUESTIONS PRESENTED

1. Whether delivery of summons and complaint to petitioner's comptroller at its main office and place of business in Chicago, Illinois, was effective to confer *in personam* jurisdiction of petitioner on Washington courts under the provisions of the due process clause of the 14th Amendment of the United States Constitution.

2. Whether, constitutionally, a state may subject a foreign corporation to *in personam* jurisdiction of its courts in a case based solely upon alleged tort where the tortious conduct, if any, was completely outside the territorial limits of the state and the sole basis for such jurisdiction is the fact that the injury occurred within the state.

STATUTES INVOLVED

The statutory provisions involved herein are Washington Laws of 1959, Ch. 131, codified as RCW 4.28.180 and 4.28.185, as follows:

" 4.28.180
Personal service of summons or other process may

be made upon any party outside the state. If upon a citizen or resident of this state or upon a person who has submitted to the jurisdiction of the courts of this state, it shall have the force and effect of personal service within this state; otherwise it shall have the force and effect of service by publication. The summons upon the party out of the state shall contain the same and be served in like manner as personal summons within the state, except it shall require the party to appear and answer within sixty days after such personal service out of the state."

" 4.28.185

(1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:

(a) The transaction of any business within this state;

(b) The commission of a tortious act within this state;

(c) The ownership, use, or possession of any property whether real or personal situated in this state;

(d) Contracting to insure any person, property or risk located within this state at the time of contracting.

(2) Service of process upon any person who is subject to the jurisdiction of the courts of this state, as provided in this section, may be made by personally serving the defendant outside this state, as provided in RCW 4.28.180, with the same force and effect as though personally served within this state.

(3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

(4) Personal service outside the state shall be

valid only when an affidavit is made and filed to the effect that service cannot be made within the state.

(5) In the event the defendant is personally served outside the state on causes of action enumerated in this section, and prevails in the action, there may be taxed and allowed to the defendant as part of the costs of defending the action a reasonable amount to be fixed by the court as attorneys' fees.

(6) Nothing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by law."

The question involved is whether the application of the above statute to petitioner is permissible under the due process clause of the 14th Amendment to the United States Constitution.

STATEMENT

This action was instituted by respondent in the Superior Court of the State of Washington for Yakima County to recover for alleged damage to respondent's hop yard claimed to have been caused by an insecticide containing an ingredient known as heptachlor. The basic ingredient of the insecticide, technical heptachlor, was manufactured by petitioner. Technical heptachlor was not, in the form sold, usable as an insecticide but was sold to formulators who mixed it with other ingredients to make a usable insecticide.

A. Factual Background

Petitioner is an Illinois corporation with its principal place of business in Chicago and plants in Marshall, Iowa and Memphis, Tennessee. It produces and sells at

wholesale basic chemicals, including technical heptachlor, which are used in the formulation of pesticides. Its products cannot be used by ultimate consumers without further processing by formulators (St. 9).

Technical heptachlor is a brown, waxy, solid, not usable in this form as an insecticide (St. 2257). It is sold to completely independent formulators who combine it with other ingredients to produce liquids and dusts marketable and usable as insecticides (St. 2252).

The insecticide here involved was formulated in Portland, Oregon, by Miller Products Co., sold by Miller to Crop King Company of Yakima, repackaged by Crop King under its own label and sold to a retailer, Toppenish Hop Growers Supply, by this last concern sold to respondent and by respondent applied to its hop yard at Satus, Washington (St. 2072 to 2087, Ex. 34).

Respondent, a California corporation, is a wholly owned subsidiary of S. S. Steiner, Inc., a New York corporation, an international hop brokerage concern with general offices in New York City.

Respondent says that in the spring of 1956, it observed an infestation of strawberry root weevils in its hop yard and advised S. Stinor Gimbel, a vice president in New York City of the parent company, it wished to apply heptachlor to control this infestation and that Mr. Gimbel says he then wrote to petitioner a letter concerning "Heptachlor tolerance on hops" under date

of April 27, 1956 (Appendix C infra, page 12a) (St. 1656, Ex. 119A). Petitioner's chief entomologist, Mr. Bussart, answered that letter from Chicago by letter of May 4, 1956, to respondent's parent at its New York office. Petitioner's letter appears in full in the Washington Supreme Court opinion (Appendix A infra, page 5a).

Mr. Gimbel says he then telephoned respondent at Yakima authorizing use of heptachlor and respondent says it thereafter made the application of heptachlor with resulting damage to its hop yard. Petitioner's alleged negligence in forwarding to New York this letter written in Chicago on May 4, 1956, forms the sole basis for this action against petitioner.

Petitioner never sold its technical heptachlor to any Washington State purchaser (St. 9, 10, 14). Formulators utilizing petitioner's basic chemical were all located outside Washington (St. 10). Petitioner had no warehouse in that state, it stored no merchandise there and had no salesmen soliciting orders there (St. 10). Its only Washington activity (which was *not* relied upon by the Washington Supreme Court to impose *in personam* jurisdiction on petitioner) was the "missionary work" of a field man who made at most two trips to Washington before respondent put the insecticide on its hop yards. In the absence of any showing that respondent decided to use the pesticide because of the two visits of that field man it was impossible, of course, for

respondent to contend that its cause of action *arose out of that activity*. Accordingly, the condition upon which this court distinguished *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957) in *Hanson v. Denckla*, 357 U.S. 235 (1958) did not exist. No basis for asserting jurisdiction over petitioner *did exist*, save only the fact that a product which it did not sell in Washington ultimately found its way here and produced injury.

The Supreme Court of the State of Washington, with these facts as its basis held that the courts of Washington had jurisdiction "inasmuch as the fact that the injury occurred in this state was sufficient to bring the case within the 'tortious act' classification." (Appendix A infra, page 3a.)

It found it "not necessary to decide" whether the "missionary work" referred to amounted to the "transacting of business . . ." in Washington, since it held that the fact that respondent's hop yards *located here* were damaged was a sufficient basis on which to predicate *in personam* jurisdiction over petitioner. (Appendix A infra, page 3a.)

B. The Federal Question and the Way It Arose

When summons and complaint were delivered to it, petitioner appeared specially in the Superior Court of Yakima County and moved to quash the service raising the question of the power of the state court to subject it to *in personam* jurisdiction under the due process

clause of the 14th Amendment (St. 6, Tr. 206). *Pennoyer v. Neff*, 95 U.S. 714 (1878), clearly established that the constitutional question of the power of the state over the person of the defendant is a federal question and may be raised directly. Upon the adoption by Washington of rules patterned after the Federal Rules of Civil Procedure, and while its special appearance and motion to quash was pending, petitioner moved to dismiss pursuant to the provisions of rule 12(b) on the ground, among others, of lack of jurisdiction over the person of petitioner (St. 20, Tr. 185). These motions were denied. Petitioner then answered and raised the jurisdictional question as an affirmative defense (Tr. 175). The question was again raised by renewed motion to dismiss at the beginning of trial (St. 44-46), by a motion to dismiss at the close of respondent's case (St. 2056), by motion for directed verdict (St. 2510), and after adverse verdict of the jury by motion for judgment n.o.v. (Tr. 34) all of which motions were denied. The question was presented to the Supreme Court of Washington both in petitioner's original briefs and oral argument and in the petition for rehearing. (Petitioner's briefs below and its motion for rehearing are included in the record certified by the clerk of the Supreme Court of Washington, Tr. 0289 and 0290).

REASONS FOR GRANTING THE WRIT

In recent years most of the States of the Union have adopted in one form or another statutes providing for

out-state service of process on non-residents, the so-called "long arm" statutes. The Washington statute is patterned after the Illinois Act. Impetus to adoption of such legislation was given by this court's opinions in *International Shoe Co. v. Washington*, 326 U.S. 310, (1945) and *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957). However, in the *International Shoe Co.* case this court indicated the permissible limits of state power when it said that the defendant must "have certain minimum contacts with it [forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' " (326 U.S. at 316).

Despite this stricture and the clear warning of this court in *Hanson v. Denckla*, 357 U.S. 235 (1958), that the cause of action must at least arise out of ". . . an act done or transaction consummated in the forum state." (357) U.S. at 251), the courts of many of the states have embarked upon a "collision course" in which one case becomes a stepping stone for the next in sweeping aside limitation on *in personam* jurisdiction over out-of-state manufacturers whose products either alone, or as components of another manufacturer's goods, are charged with failure which occasions injury. This trend has reached such proportions that no local manufacturer however small can manufacture in one state with any degree of assurance that whether he has or has not placed his goods in the stream of interstate commerce, he may not be

called upon to respond in the courts of some distant jurisdiction to which his goods may have found their way. The whole subject of *in personam* jurisdiction is replete with confusion, conflict and contradiction among and between the courts, both state and federal, and writers on the subject.

Thus, in *Velandra v. Regie National des Usines Renault*, 336 F.2d 292 (6th Cir. 1964) the court held that the minimum contacts were not present and dismissed the action. The suit was for injuries allegedly caused by defective brakes. The named defendant, a French car manufacturer, shipped its cars to its wholly owned subsidiary, a New York corporation. The subsidiary, in turn, sent the vehicles to regional distributors who sold them to independent local dealers. The court found that the required minimum contacts with the State of Michigan were not present. However, the California District Court of Appeals, on identical facts involving the same defendant, upheld the jurisdiction of California courts in *Regie National des Usines Renault v. Superior Court*, 208 Cal. App.2d 702, 25 Cal. Rpt. 530 (1964).

The Supreme Court of Illinois purported to assume *in personam* jurisdiction over a foreign manufacturer in *Gray v. American Radiator and Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961). The only contact with the forum state was the fact of injury in Illinois. This court disagreed with the prior construction of the statute by the United States District Court

for the Northern District of Illinois in *Hellriegel v. Sears, Roebuck & Co.*, 157 F. Supp. 718 (N.D. Ill. 1957), which represented a reasonable and constitutional construction of the Illinois statute. In a later case, *McMahon v. Boeing Airplane Co.*, 199 F. Supp. 908 (N.D. Ill. 1961) the judge who wrote the *Hellriegel* opinion expressed strong disagreement with the rationale of the *Gray* case, but felt himself bound by it under the doctrine of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1937).

The Court of Appeals of New York disagreed with the *Gray* opinion in *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 15 N.Y.2d 443, 209 N.E.2d 68 (1965). In this case a container of liquified propane gas being hauled from Pennsylvania to Vermont exploded in New York causing injury to the plaintiffs. The plaintiffs sued *inter alia* the manufacturer of the container, a Kansas corporation, which delivered the container to a Missouri corporation, which mounted it on a wheelbase and sold it to a Pennsylvania corporation, which was an interstate carrier by road. The New York court reversed and directed the dismissal of the action as to the manufacturer of the container.

There also is conflict between the United States District Court for the Eastern District of Michigan and the Court of Appeals for the Sixth Circuit. The position of the Court of Appeals in the case of *Velandra v. Regie National des Usines Renault*, 336 F.2d 292 (6th Cir. 1964) has been discussed above. The District Court in

Chovan v. E. I. DuPont De Nemours & Co., 217 F. Supp. 808 (E.D. Mich. 1963) sustains jurisdiction over a Connecticut manufacturer of fuses who shipped them to DuPont's warehouse in Chicago where they were combined with dynamite charges and shipped into Michigan.

There is, likewise, a conflict as to the constitutionally permissible extent of a state's power over a non-resident defendant between the Supreme Court of New Hampshire, *Roy v. North American Newspaper Alliance*, 205 A.2d 844 (N.H. 1964) and the United States Courts of Appeal for the Seventh and Fifth Circuits, *Insull v. New York, World-Telegram Corporation*, 273 F.2d 166 (7th Cir. 1959) and *Buckley v. The New York Times Co.*, 338 F.2d 470 (5th Cir. 1964). These cases involved the tort of libel and the amenability to substitute service of process of out-of-state defendants whose allegedly libelous publications have incidentally found their way into the forum state.

Minnesota is another state of conflict between state and federal courts on this issue. The United States District Court in *Mueller v. Steelcase, Inc.* 172 F. Supp. 416 (D. Minn. 1959) held that the mere fact of injury in the forum state is not sufficient to constitute a minimum contact within the due process clause of the 14th Amendment and quashed service of process. Thereafter, the Supreme Court of Minnesota disagreed and held that the fact of injury in Minnesota was sufficient to

confer jurisdiction of the out-of-state defendant on Minnesota courts, *Atkins v. Jones & Laughlin Steel Corp.*, 258 Minn. 571, 104 N.W.2d 888 (1960) and *Adamek v. Michigan Door Co.*, 260 Minn. 54, 108 N.W. 2d 607 (1961). The Federal District Court in Minnesota disagreed with the Minnesota Supreme Court on constitutional grounds in *Pendzimas v. Eastern Metal Products Corp.*, 218 F. Supp. 524 (D. Minn. 1961). The United States Court of Appeals for the Eighth Circuit in *Aftanase v. Economy Baler Co.*, 343 F.2d 187 (8th Cir. 1965) seems to lean toward the interpretation of permissible limits of state jurisdiction as adopted by the Minnesota Supreme Court without, however, fully resolving the conflict. The granting of the writ of certiorari in this case would materially help in the resolution of this burning problem. It may be further pointed out that the position of the Eighth Circuit in the *Aftanase* case is in direct conflict with the position of the Fourth Circuit in *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*, 239 F.2d 502 (4th Cir. 1956).

The Supreme Court of Minnesota in *Ehlers v. U. S. Heating & Cooling Mfg. Corp.*, 267 Minn. 56, 124 N.W. 2d 824, 827 (1963), highlights the burning need for a resolution of the issue by this court:

> *"There is no decision of the United States Supreme Court directly in point. In the absence of specific controlling authority with respect to federal constitutional limitations on the power of the state to provide for service upon foreign corporations in*

> *the manner specified by* § 303.13, *subd.* 1(3), *it remains our opinion that service upon a foreign corporation in the manner prescribed is effectual to confer jurisdiction in cases such as this.* We feel justified, in view of the record, in concluding that the product here involved was manufactured by appellant corporation for use by the general public. It is not contended that the area of foreseeable use of the product was so limited as to exclude the State of Minnesota. The affidavit filed in support of the motions to dismiss did not negate the reasonable inference that the 'Fireball' boiler is a mass-production unit intended for nationwide use. The fact that such a product sold to a Chicago distributor would, in the regular course of distribution, be purchased and used by a Minnesota buyer would seem reasonably to have been anticipated by the manufacturer. Appellant, National Heating, does not claim by affidavit or otherwise that the 'Fireball' here involved acquired Minnesota situs in any way other than in the usual and customary marketing process vital to the conduct of a profitable enterprise. We conclude, therefore, that the situation is one controlled by our prior decisions. Whether a different result would follow in this case were the manufacturer to have established that the use of his product in Minnesota was not foreseeable need not be and is not determined. The order of the district court refusing to quash the service of process and to dismiss the proceedings against National Heating & Cooling Manufacturing Corporation is affirmed." (Emphasis supplied.)

The product involved in the *Ehlers* case was a boiler manufactured in Ohio and sold to one of the plaintiffs in Minnesota after it went through the hands of two independent wholesalers and one retailer. The facts in the case at bar are even more extreme since the technical heptachlor manufactured by petitioner is not

usable by a farmer, but must undergo further manufacturing. Furthermore, the heptachlor was not defective and was true to label.

Significantly, there is also a conflict between the Supreme Court of Washington and the United States District Court for the Eastern District of Washington. The latter court, in four cases involving suits by the hop growers against the petitioner herein for damages from the use of the formulation of the same product sustained motions to dismiss on the ground of lack of jurisdiction over the person of petitioner. The unpublished opinion of the court is attached hereto (Appendix D infra, page 13a). These cases involved the same defendant, the use of the same basic product and alleged injuries to hops occurring at about the same time. The differing results between those cases and this cannot be rationalized on the basis of factual differences.

Short of expression by this court, there appears no prospect of resolution of this welter of conflicting opinions and a litigant's rights would seem to depend only on his good or bad fortune in the selection of the court before which he must appear and not upon his activity or lack of activity in the forum.

The ultimate question to be answered is whether the mere happenstance of injury in the forum state is sufficient under the minimum contacts test of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and *Han-*

sen v. Denckla, 357 U.S. 235 (1958). We respectfully submit that it is not. The minimum contacts specified by this court must obviously mean some conscious and voluntary act of the nonresident, which would knowingly bring him into substantial contact with the forum. An unequivocal answer to this question will affect a great number of cases and will clarify this important problem involved in our federal scheme of dual sovereignty.

CONCLUSION

The assumption of *in personam* jurisdiction over petitioner by the courts of Washington deprived it of due process of law under the provisions of the 14th Amendment to the United States Constitution. There are irreconcilable conflicts between the various jurisdictions in both federal and state courts as to the constitutionally permissible reach of the statutes such as that here involved, the so-called "long arm" statutes. For these reasons, the writ of certiorari prayed for should be granted.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

GOLDEN GATE HOP RANCH, INC., a corporation, *Respondent*, v. VELSICOL CHEMICAL CORPORATION, a corporation, *Appellant*.	No. 37411 Dept. One Filed June 17, 1965

The respondent, owner of a large hop ranch in Yakima County, Washington, obtained a jury verdict in the trial court for $215,027.26, in its suit brought against the manufacturer of a chemical called "heptachlor" for damage to its hop yards and lands, which the jury found was occasioned by the negligence of an agent of the appellant who recommended that the chemical be used on the hops.

The appellant's first contention is that its motion to quash service of process was improperly denied. A copy of the summons and complaint were served on a corporate officer of the appellant in Chicago, Illinois, on September 4, 1959. The statute which gives the courts of this state jurisdiction over a non-resident when he has been served personally outside this state, is RCW 4.28.185. That statute provides (in pertinent part):

> "(1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdic-

tion of the courts of this state as to any cause of action arising from the doing of any of said acts:

"(a) The transaction of any business within this state;

"(b) The commission of a tortious act within this state;

"(3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

"(4) Personal service outside the state shall be be valid only when an affidavit is made and filed to the effect that service cannot be made within the state."

The act upon which liability in this case was predicated was the writing and mailing of a letter from the Chicago office of the appellant corporation, recommending the use of heptachlor on hops. The letter was sent to an officer of the respondent corporation's parent corporation in New York. The appellant contends that, since this act did not occur in this state, the requirements of the statute were not met.

However, in the recent case of *Nixon v. Cohn*, 62 Wn. 2d 987, 385 P.2d 305, we held that, where damages result from negligence of a defendant, the injury occurring in this state is an inseparable part of the "tortious act," as that term is used in the statute. Consequently, the respondent brought itself within one of the subdivisions of the act and was entitled to take advantage of its provisions.

There was also evidence that, while heptachlor in its raw form is not sold in this state, but is sold to

manufacturers in other states who combine it with other ingredients to form usable pesticides, which are then sold through distributors in this state, the appellant manufacturer does engage in nation-wide advertising and has sent a representative to this state to do "missionary" work for the product.

The company also subsidizes a research laboratory at Washington State College, at Pullman, which conducts tests in the use of the chemical. A strong argument can be made that these activities were sufficient to constitute the transacting of business within this state, as that term is used in the statute. However, it is not necessary for us to decide whether the appellant's activities fall within that classification, inasmuch as the fact that the injury occurred in this state was sufficient to bring the case within the "tortious act" classification. *Nixon v. Cohn, supra.*

We note also in passing that it appears that the court in Yakima County was the most convenient forum in which to try the issues.

The appellant maintains that service was not effected according to the terms of the statute inasmuch as the affidavit required by paragraph 4 thereof was not filed until September 15, 1959, eleven days after the summons and complaint were delivered.

The statute does not provide that the affidavit must be filed *before* the summons and complaint are served,

but simply that the service will be valid only when such an affidavit is filed. Consequently, the service became valid when the affidavit was filed. Furthermore, we have the rule in this state that substantial and not strict compliance is sufficient where a proper affidavit is filed, although late, where it appears that no injury was done the defendant as a result of the late filing. *Whitney v. Knowlton*, 33 Wash. 319, 74 Pac. 469.

The appellant urges that its motion for a new trial should have been granted because of misconduct of the baliff. Five jurors made affidavits that the bailiff had told them, on Friday evening after they had been sent to begin their deliberations, that if they did not reach a verdict before ten o'clock that evening, they would be locked up for the weekend, because the judge would not be there to receive their verdict before Monday morning.

The bailiff denied that he made this statement, and other jurors signed affidavits that no such statement was made in their presence. The trial court found as a fact that the statement was not made. Since the evidence on the matter was conflicting, it was necessary that the trial court make a finding of fact as to whether the alleged misconduct occurred; and this court will accept the trial court's finding. *Gardner v. Malone*, 60 Wn.2d 836, 376 P.2d 651.

By its fourth assignment of error, the appellant ad-

vances the proposition that the evidence was insufficient to support a finding that it was guilty of negligence.

The evidence established that the respondent, through an agent of its parent corporation, applied to the appellant for information about the proper use of products containing heptachlor on its hop crops. The inquiry was inspired by the Miller Amendment of the Federal Food, Drug and Cosmetic Act pertaining to residues of pesticides on raw agricultural commodities, which might be harmful to human beings. The appellant's entomologist replied with the following letter:

"May 4, 1956

"Mr. S. Stinor Gimbel
S. S. Steiner, Inc.
655 Madison Avenue
New York 21, N. Y.

"Dear Mr. Gimbel:

"Your letter of April 27, 1956 was referred to me for answering since I have been handling our label acceptances.

"We have a release from the hop growers' association of Washington listing two types of applications for heptachlor on hops as follows:

"1—Fifty pounds of Heptachlor 2½% Dust per acre directed at the base of the plants. This application is made early in June.

"2—Apply five pounds of actual heptachlor to the soil before growth starts and disk into the soil.

"These applications would not leave a residue on the harvested part of the plant due to the timing of the applications.

"The Food and Drug Administration does not require tolerances if the application of heptachlor is made at a time that will not produce a residue.

Hence no tolerance for the use of heptachlor on hops is necessary if either of the above recommendations are used. I called the Plant Pest Control Board, Washington, D. C., who register labels, and they confirmed this opinion on tolerances.

"We trust this will give you the necessary information for passing out a release to your growers.

"Sincerely yours,
"VELSICOL CHEMICAL CORPORATION
J. Everett Bussart
Chief Entomologist"

"JEB:GC"

The writer of this letter did not know whether heptachlor would be harmful to hops, but he was aware that it had not been tested on hops, as this information was contained in a bulletin from the Washington Hop Growers, which he quoted in answering the respondent's inqury. However, he did not mention this fact in the letter. He was also aware that a label recommending use of the product on hop crops could not be used until tests had been made and approval of the federal government obtained. The appellant had never recommended use of the product on hops, but the respondent contends, and the trial court held, that this letter could be construed as a recommendation for its use.

If this letter did constitute a recommendation that the product be used on the respondent's hops, and if the appellant knew or should have known that the product was dangerous to hops, the appellant was negligent in not advising the respondent of the danger. It was for the jury to determine from the evidence whether or

not these elements of negligence were proved.

The fact that there was no privity of contract between the parties does not preclude the action based on a theory of negligence. In the recent case of *Nakanishi v. Foster*, 64 W.D.2d 660, 393 P.2d 635, we laid down the rule that a manufacturer or processor who offers goods on the market to remote users must use reasonable care where there is a foreseeable risk of harm if reasonable care is not used. It is true that in this case there was no negligence in the manufacture of the product and no defect in the product itself, but the jury could find that there was negligence on the part of the appellant's agent in not warning the prospective purchaser of a possible danger of which he was or should have been aware.

It is next contended that the court erroneously permitted the respondent to introduce evidence showing that the appellant made applications for label clearance for the use of heptachlor on hop crops after the correspondence with the respondent's representative. The appellant cites *Aldread v. Northern Pac. R. Co.*, 93 Wash. 209, 160 Pac. 429, which sets forth the familiar rule that the taking of precautions against future accidents is not an admission of negligence in the past and is not probative of such negligence.

The fact that the appellant made application for label clearance very shortly after he had answered the respondent's inquiry, does not tend to show that the

appellant knew the product was dangerous to hops when the inquiry was made, as the appellant points out. However, taken in conjunction with the evidence that label clearance is required by the federal government, it does show that he was aware of a possible danger, and was aware, or should have been aware, that no clearance had been obtained to recommend the product for use on hops.

Evidence of subsequent conduct is inadmissible only when it has no probative value on the issues before the court. 2 Wigmore on Evidence 3d ed., § 283. All facts are admissible in evidence which afford reasonable inferences or throw any light upon contested matter, and "relevancy" means the logical relation between proposed evidence and the fact to be established. *Chase v. Beard*, 55 Wn.2d 58, 346 P.2d 315. We do not find an abuse of discretion in the admission of this evidence. The appellant did not request an instruction limiting the purposes for which the evidence could be considered and consequently cannot complain that none was given.

Error is assigned to the admission in evidence of a lease containing an option to purchase, which the respondent negotiated to obtain additional land when 112 acres had to be taken out of production as a result of the damage done by the heptachlor. It is the appellant's contention that the option price for the purchase of roots and trellis was inadmisible to show the cost of replanting the 112 acres. As the respondent points out,

the lease was admitted to rebut an inference made by the appellant that the 112 acres was voluntarily abandoned, and no instruction was requested limiting its purpose. Consequently the fact that it was submitted to the jury without limitation as to its purpose cannot be claimed as error.

The appellant alleges that the court erred in allowing the jury to consider the respondent's claimed loss of sales of hop roots, because no sales of roots had been made in prior years. It cites our cases holding that lost profits cannot be recovered unless it is shown that the plaintiff's business has been in operation for such a period of time as to give it permanency and recognition, and that such business was earning a profit which could be reasonably ascertained and approximated. Because there was no evidence that the respondent had ever realized a profit from the sale of hop roots, the appellant maintains, this item of claimed damage was speculative and not recoverable.

Answering this contention, the respondent points to our recent case of *Larsen v. Walton Plywood Co.*, 64 W. D.2d 36, 51, 390 P.2d 677, wherein we observed that strict adherence to the "new business" rule can result in the denial of damages where justice requires their allowance and approved the rule laid down in *Barbier v. Barry*, 345 S.W.2d 557, 563 (Tex. Civ. App. 1961), as follows: Lost profits will not be denied merely because business is new if factual data is available to fur-

nish a basis for computation of probable losses.

There was evidence from which the jury could find that the respondent would have made substantial sales of slip roots in the years in question, although it had not made a practice of selling them in the past. There was evidence that such roots had been produced with fair abundance in the past and that the market for them had risen and they were bringing a good price. The evidence was sufficient to support a verdict and was not merely speculative.

The remaining assignments of error, which have been examined and found to be without merit, do not warrant discussion.

The judgment is affirmed.

ROSELLINI, C. J.

We concur:

OTT, J.

HUNTER, J.

HALE, J.

STAFFORD, J. Pro Tem

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

GOLDEN GATE HOP RANCH, INC., *Respondent*, v. VELSICOL CHEMICAL CORPORATION, *Appellant*.	No. 37411

ORDER DENYING PETITION FOR REHEARING

The court having considered the appellant's petition for a rehearing herein and a majority of the judges being of the opinion that it should be denied,

IT IS ORDERED that the petition be and it is hereby denied.

Dated this 14th day of September, 1965.

By the court:

HUGH J. ROSELLINI,
Chief Justice.

APPENDIX C

"April 27, 1956

"S. S. Steiner, Inc.
605 Madison Avenue
New York 21, N. Y.
"The Velsicol Corporation
330 East Grand Avenue
Chicago 11, Illinois
"Attn.: Mr. L. P. Wilks, Director of Research
Re: Heptachlor tolerance on hops
"Gentlemen:

"We understand that you manufacture a chemical called Heptachlor.

"In view of the recent Miller Amendment of the Federal Food, Drug and Cosmetic Act, pertaining to residues of pesticides on raw agricultural commodities, we would like to have your recommendations on the tolerance and use of Heptachlor applied in or on hops. Is there a different tolerance established for soil application as well as foliage application?

"We want to pass this information on to our growers who are in doubt as to whether they can use Heptachlor under the new Federal regulation.

"Thanking you in advance, we are,

Very truly yours,
S. S. Steiner, Inc.
/s/S. Stinor Gimbell"

APPENDIX D

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON

SOUTHERN DIVISION

HELEN B. MERRILL, a widow, KENNETH SCHAEFER and JESSIE LOU SCHAEFER, husband and wife, and MARJORIE MERRILL, an unmarried woman,

Plaintiffs,

v.

VELSICOL CHEMICAL CORPORATION, a corporation,

Defendant.

No. 1491

C. G. TRUSELEY,

Plaintiff,

v.

VELSICOL CHEMICAL CORPORATION, a corporation,

Defendant.

No. 1492

OPINION

RAY POIRIER and ROSANNA POIRER, husband and wife,

Plaintiffs,

v.

VELSICOL CHEMIACAL CORPORATION, a corporation,

Defendant.

No. 1493

PETER STEINBOCK and CELIA STEINBOCK, husband and wife,

Plaintiffs,

v.

VELSICOL CHEMIACAL CORPORATION, a corporation,

Defendant.

No. 1494

Defendant has moved to dismiss the various complaints in the four cases captioned above. The motion is based on the ground of lack of jurisdiction over the persons of the defendants (Rule 12(b) (2) F.R.C.P.). The plaintiffs claim jurisdiction by reason of out-of-state service on the defendant under R.C.W. 4.28.180 and R.C.W. 4.28.185, which provide that a person outside the state, under certain circumstances, is subject to the jurisdiction of the courts of the State of Washington. The acts pertinent here are as follows:

> "(a) The transaction of any business within this state;
> (b) The commission of a tortious act within this state;
> (c) The ownership, use, or possession of any property whether real or personal situated in this state; * * *"

R.C.W. 4.28.185 also contains the following:

> "(3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this section."

This statute is new to the State of Washington. It was passed in 1959 and appears in the Session Laws as Chapter 131, Laws of 1959. It had an effective date of June 11, 1959.

Rule 4(d) F.R.C.P. provides in part:

> "Summons: Personal service. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as

follows * * * (7) upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state."

Under the two sections above, plaintiffs assert that service in the State of Illinois upon the defendant corporation was suffiicient to bring the corporation within the jurisdiction of this court.

From the files in these cases the situation appears to be substantially as follows:

The plaintiffs are all residents of the Southern Division of the Eastern District of the State of Washington. The defendant is a non-resident foreign corporation, organized and existing under and by virtue of the laws of the State of Illinois, where it had its principal place of business.

Plaintiffs assert in their complaints (paragraph IV) that at all times the defendant was a manufacturer of chemical products, which were placed upon the market by the defendant through distributors and retailers for the stated and recommended purpose of destroying and controlling various agricultural pests, and that the defendant did, during the times here mentioned, through its advertising and authorized agents, claim and assert

that said insecticide would destroy and control certain pests.

The plaintiffs further allege that on or about April 10 to 21, 1956, plaintiffs, relying upon the claims, advertising, assertions, information and warranties made by the defendant, purchased a dangerous substance known as Heptachlor, in reliance upon the claims, advertising, assertions, information and warranties to the effect that it was not dangerous and deleterious but reasonably fit for the intended use and purpose for which it was to be used.

Plaintiffs further allege that by reason of the application of the chemical Heptachlor to plaintiffs' land, the hop plants, fields and lands of the plaintiffs were damaged and the plaintiffs have sustained substantial monetary damage on account thereof.

The sole question for determination on the particular motion is whether the defendant has carried on such activities within the State of Washington as are contemplated by the statute, R.C.W. 4.28.185, thus entitling the plaintiffs to bring the action in the State of Washington and make service on the defendant in the State of Illinois.

From the briefs it is understood that the first two sub-sections are relied upon by the plaintiffs, that is, that the defendant was engaged in the transaction of business within the State of Washington and committed

tortious acts within the State of Washington, thus rendering defendant subject to the terms of the statute.

Plaintiffs have filed two affidavits of an agent of the defendant. The affidavits are made by Mr. Howard Beaudoin and are dated August 27, 1959, and November 6, 1959, respectively. From the affidavits it appears that the activities of the defendant corporation in the State of Washington consisted substantially of the following:

That an agent of the defendant visited the State of Washington for promotional and missionary purposes; that he conferred with county agents and discussed the chemicals manufactured by the defendant and discussed them with the distributors of the defendant's chemicals. The agent further and in addition gave recommendations to formulators and distributors or county agents upon request and frequently made recommendations and gave advice with respect to the use of the products of the defendant.

That the agent furnished to formulators and dealers and distributors printed pamphlets in quantities so that the printed material could be made available to the ultimate consumers explaining the use and method of application of the chemicals. He attended meetings of dealers handling chemicals. There was newspaper advertising in the State of Idaho, but there was no newspaper advertising in the State of Washington.

That most of the pamphlets brought to the State of Washington were distributed through the distributors or formulators to whom Velsicol sold its products. That the agent of Velsicol made no sales and did not solicit or take orders in the State of Washington. That the taking of orders was not one of the agent's duties. That none of the formulators referred to in the first affidavit of August 27, 1959, received delivery of Velsicol products or formulated products nor used Velsicol products within the State of Washington; that none of the Velsicol products were sold by the formulators within the state in the form in which they were acquired from Velsicol. That the products were always combined with other ingredients and the resulting compound sold as the product of the formulator. That to the best of the knowledge of the agent making the affidavit in behalf of the defendant there was no direct contact between any of the plaintiffs and the defendant corporation or its agents within this state. That they were completely unaware, until after the commencement of this suit, of the use of Heptachlor by the plaintiffs as referred to in plaintiffs' complaints. Affiant further states that he at no time recommended to anyone the use of Heptachlor on hops, nor was affiant aware that plaintiffs were contemplating any such use.

From the foregoing the court is called upon to determine whether the defendant at the time the cause of action arose was engaged in the transaction of any busi-

ness within the State of Washington or was engaged in the commission of a tortious act within the State of Washington.

It is true that false representations do constitute tortious actions. *Johns v. Bay Street Abrasive Products Co.*, 89 F. Supp. 654 (Maryland 1950), and *Bluff Creek Oil Company v. Green*, 257 F.2d 83, (5th Cir. 1958).

There must be a casual connection between the misrepresentations made and the particular cause of action asserted. Such was the case in the Bluff creek case. To hold that defendant here committed a tortious act by permitting distribution of pamphlets would appear to make an application of the statute far beyond that intended by the legislature.

The provision in sub-paragrph 3 of the statute that only cause of action arising from acts enumerated may be asserted against a defendant must mean that the cause of action arose from the tortious act committed within the state. To find no cause of action here arising from a tortious act committed within the state within the interpretation of similar statutes, as made by the courts, notably the following:

Johns v. Bay State Abrasive Products Co., 89 F. Supp. 654, 660 (supra)

Hellreigel v. Sears, Roebuck & Co., 157 F. Supp. 718 (Illinois, 1957)

Mueller v. Steelcase, Inc., 172 F. Supp. 416, (Minnesota, 1959)

Earlanger Mills v. Cohoes Fibre Mills, 239 F.2d 502 (4th Cir. 1956).

It is the conclusion of the court that the defendant is not subject to the jurisdiction of the court on the service made in the State of Illinois under the statute as claimed, as no tortious act within the contemplation of the statute was committed by the defendant within the State of Washington giving the court jurisdiction.

The plaintiffs likewise contend that the defendant was transacting business within the State of Washington and therefore comes within the perview of R.C.W. 4.28.185 (1) (a).

From the statements made by the affiant, the agent of the defendant corporation, it would appear that the defendant was primarily engaged in promoting the sale of the product within the State of Washington through a non-resident salesman, that it owned no property in the state, did not accept orders directly through the agents, and solely carried on a promotional activity in connection with the business.

There must be "minimal contacts" which are essential to the transaction of any business within the State of Washington, to subject the defendant to the jurisdiction of this court by service outside this state. Under the statements contained in the affidavits it would appear that such minimal contacts have not been shown to exist. This is supported by the cases cited above, and

by *Trippe Mfg. Co. v. Spencer Gifts*, 270 F.2d 821, (7th Cir., 1959).

The case of *McGee v. International Life Insurance Company* (1957), 355 U.S. 220, 78 S. Ct. 199, 2 Law Ed. 2d 223, is one of minimal contact in the State of California, which contact was conducted by mail directly with the defendant. This particular case has in some instances been limited to the insurance field. In any event it was the transaction of a type or item of busines directly with the plaintiff involved in that case, and for that reason does appear to be distinguishable from this case.

In the case of *Trippe Mfg. Co. v. Spencer Gifts* above cited, the defendant was actually and in fact sending advertising matter into the State of Illinois. That case would appear to be similar to the one here involved and no minimal contact was found.

For the reasons stated it is the opinion of the court that the Motion to Dismiss on the ground of lack of jurisdiction of the person of the defendant must be granted.

MOTION TO DISMISS ON GROUND STATUTE OF LIMITATIONS HAS RUN

As a second portion of its argument, defendant moves to dismiss on the ground that the statute of limitations has run and that all the causes of action are outlawed.

Further, the defendant asserts that the two-year statute of limitation applies.

In view of the fact that the first portion of defendant's motion is being granted, it does not appear proper for the Court now to pass on the second question. No ruling is called for because the dismissal for lack of jurisdiction takes with it the entire action.

The defendant may prepare the necessary order in the four cases granting Motion to Dismiss for lack of jurisdiction.

Dated the 1st day of September, 1960.

CHARLES L. POWELL,
United States District Judge